

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT TACOMA

## **PORT OF VANCOUVER USA,**

CASE NO. 3:23-cv-05560-DGE

**Plaintiff,**

**ORDER GRANTING MOTION TO  
DISMISS AND COMPEL  
ARBITRATION (DKT. NO. 21)**

## BNSF RAILWAY COMPANY,

**Defendant.**

## I INTRODUCTION

This matter comes before the Court on Defendant BNSF Railway Company's Motion to Dismiss the Complaint and Compel Arbitration. (Dkt. No. 21.) Upon review of that motion, the Plaintiff's response (Dkt. No. 25), Defendant's reply (Dkt. No. 26), and the remaining record, the Court **GRANTS** the motion.

## II BACKGROUND

Plaintiff Port of Vancouver USA (POV) and Defendant BNSF Railway Company (BNSF) are parties to the West Vancouver Freight Access and Industrial Track Agreement

1 (Agreement). The Agreement was created because POV wished to expand and upgrade  
2 infrastructure and improve rail access to existing and potential customers at the port. (Dkt. No. 1  
3 at 4.) BNSF, the sole rail operator at the port at the time, owned the land and rail track POV  
4 wanted to develop in its expansion plans. (*Id.*) Under the Agreement, BNSF sold tracks of the  
5 land to POV in exchange for memorializing BNSF's status as the "Exclusive Rail Operator"  
6 (ERO). (*Id.*) While BNSF was to remain the only railroad physically serving the port, BNSF  
7 became obligated under the Agreement to provide commercial access to the Union Pacific  
8 Railroad (UP), BNSF's major competitor, to make the port a competitive and desirable location  
9 for tenants. (*Id.* at 5.) The Agreement thus requires BNSF "to offer all Rail Customers  
10 Commercial Access to UP for so long as the Port is not in default under this Agreement," and the  
11 Agreement defines "Commercial Access" to include establishing rates and service on  
12 "reasonable and customary terms and conditions consistent with BNSF's own freight service for  
13 such freight business." (*Id.* at 21–22.) The Agreement also includes an arbitration clause:

14 If at any time a question or controversy shall arise between the Parties hereto in  
15 connection with this Agreement upon which the parties cannot agree, either Party  
16 shall have the right to require a meeting of designated representatives with authority  
17 to settle the matter within 30 days of written notice of a desire to meet; if it cannot  
18 be resolved within 30 days of the meeting of the Parties, then the aggrieved Party  
19 may demand arbitration.

20 (Dkt. No. 1 at 32.)

21 In November of 2019, POV sent BNSF a demand letter noting BNSF's alleged violation  
22 of the Agreement, including unauthorized storage of railcars with hazardous materials, the  
23 presence of BNSF rail cars on port property not bound for the port (so-called "alien cars") and  
24 BNSF's failure to meet its obligations under the Agreement to "work with the Port to attract new  
business to the port." *Port of Vancouver USA v. BNSF Railway Company*, Case No. 3:23-cv-  
05109-JNW, Dkt. No. 2-1 at 2–3 (W.D. Wash. 2023). The parties could not come to an

1 agreement on their own. *Id.* at 3–6. They agreed to engage in private arbitration for damages  
2 and injunctive relief before a panel of 3 arbitrators. *Id.*, Dkt. No. 1 at 2. The panel issued a final  
3 award on December 19, 2022. *Id.* at 3. The arbitration award addressed three issues relevant to  
4 this action: (1) the establishment of reasonable rates; (2) competitive access to certain parts of  
5 the port; and (3) the storage of alien cars on port property. (See Dkt. Nos. 21 at 16–22; 25 at 7–  
6 17.)

7       **Rates.** First, the panel ordered “BNSF shall establish rates and other terms that offer Rail  
8 Customers a like opportunity, considering cost differences, to connect with both BNSF’s and  
9 UP’s linehaul services.” (Dkt. No. 1 at 68.) BNSF’s service connection “to the Port from UP  
10 linehaul traffic shall be at the same switching rates and terms as BNSF offers to its linehaul  
11 customers under the same or similar circumstances and freight.” (*Id.* at 92.)

12       **Access.** Second, the panel found the Agreement “read in its entirety appears to  
13 contemplate competitive access to the entire Port (with the exceptions noted in Article III §3 A  
14 (iii)), especially as rail customers are likely to be those of either BNSF or UP.” (*Id.* at 88.)  
15 Those exceptions include: (a) those with the ability to receive rail service from UP; (b) shipping  
16 commodities or equipment expressly excluded, with no rates established, or not addressed in a  
17 rate schedule (attached as Exhibit F to the agreement); and (c) those originating or terminating  
18 freight at a new transload facility which may be established on the property (unless BNSF agrees  
19 otherwise). (*Id.* at 22.)

20       **Alien cars.** Third, the panel found BNSF was not permitted to use POV property for  
21 purposes unrelated to the interests of POV, and the parking of rail cars not destined to pick up  
22 freight from, or deliver it to, the port or its tenants serves no purpose of POV. (*Id.* at 94.) POV  
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1 was awarded \$86,226 for past storage of BNSF's alien cars, 12,318 days at \$7 per day. (*Id.* at  
2 95.)

3 In February of 2023, POV filed suit in this District asking the Court to confirm the  
4 arbitration award. *Port of Vancouver*, Case No. 3:23-cv-05109-JNW, Dkt. No. 1. The parties  
5 stipulated to an order confirming the award, which Judge Whitehead entered June 7, 2023. *Id.*,  
6 Dkt. Nos. 19 and 20.

7 Two weeks later, POV brought this action requesting enforcement of the judgment based  
8 on BNSF's noncompliance. (Dkt. No. 1 at 8.) According to the complaint, BNSF satisfied the  
9 judgment in part by paying for past track damage and later-occurring track damage, as well as  
10 paying for the alien cars for the February 2018–December 2022 period. (*Id.*) However, after the  
11 final award, BNSF allegedly continued to bring alien cars onto port property without  
12 authorization, failed to comply with the competitive access provisions of the Agreement, and did  
13 not provide a rate schedule of reasonable and customary rates. (*Id.* at 9.) POV therefore brought  
14 claims to enforce the award and for trespass of the alien cars. (*Id.* at 10–11.)

15 BNSF filed a motion to dismiss the action. (Dkt. No. 21.) BNSF argues it is complying  
16 with the award and POV is using this lawsuit to reinterpret the award to “secure relief it sought  
17 but did not obtain in the arbitration.” (Dkt. No. 21 at 4.) BNSF argues any dispute as to whether  
18 BNSF is complying with the award is itself subject to the arbitration clause. (*Id.*)

### 19 III DISCUSSION

#### 20 A. Rule 12(b)(6) governs motions to dismiss and compel arbitration.

21 As a preliminary matter, the motion was asserted under either Rule 12(b)(6) or 12(b)(1).  
22 BNSF argues either is appropriate, as either method leads to the same result. (Dkt. No. 21 at 14–  
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1 15.) POV argues both rules test the legal sufficiency of a claim, but any facts must be viewed in  
 2 the light most favorable to the non-movant, in this case, POV. (Dkt. No. 25 at 6.)

3 District Courts disagree on which rule governs, and the Ninth Circuit has not resolved the  
 4 issue. *See Dodo Int'l Inc. v. Parker*, No. C20-1116-JCC, 2021 WL 4060402, at \*5 (W.D. Wash.  
 5 Sept. 7, 2021) (“Arbitration clauses are agreements to waive litigating in court; they do not  
 6 deprive the court of subject matter jurisdiction.”); *Filimex, L.L.C. v. Novoa Invs., L.L.C.*, No. CV  
 7 05-3792-PHX-SMM, 2006 WL 2091661, at \*3 (D. Ariz. July 17, 2006) (analyzing motion to  
 8 dismiss and compel arbitration under 12(b)(1)); *Wolff v. Tomahawk Mfg.*, No. 3:21-CV-880-SI,  
 9 2022 WL 377926, at \*1 (D. Or. Feb. 8, 2022) (rejecting 12(b)(1) as proper vehicle), *aff'd*, No.  
 10 22-35145, 2022 WL 17749271 (9th Cir. Dec. 19, 2022). The Supreme Court addressed a similar  
 11 question in *Atlantic Marine Const. Co., v. United States Dist. Court for Western Dist. of Texas*,  
 12 571 U.S. 49 (2013), rejecting 12(b)(3)’s improper venue as a mechanism to assert a contract’s  
 13 forum-selection clause. *Id.* at 55. The Court found 12(b)(3) allows dismissal “only when venue  
 14 is ‘wrong’ or ‘improper’[,]” which “depends exclusively on whether the court in which the case  
 15 was brought satisfies the requirements of federal venue laws, and those provisions say nothing  
 16 about a forum-selection clause.” *Id.*

17 The same logic applies here—12(b)(1) allows dismissal only when the court lacks  
 18 subject-matter jurisdiction. Fed. R. Civ. P. 12(b)(1). Under 28 U.S.C. § 1332, this Court has  
 19 original jurisdiction over this matter because the action is between citizens of different states and  
 20 the value of the litigation exceeds \$75,000 exclusive of costs and interests. (Dkt. No. 1 at 1–2.)  
 21 § 1332 says nothing about forum-selection clauses; that the parties agreed by contract to resolve  
 22 their differences in a private forum does not rewrite § 1332 to deprive this Court of jurisdiction.  
 23 Rule 12(b)(6) is a better vehicle because a complaint asserting a dispute between two parties who  
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1 have bound themselves to arbitration fails to state a valid claim under contract law. *See City of*  
 2 *Benkelman, Nebraska v. Baseline Eng'g Corp.*, 867 F.3d 875, 881 (8th Cir. 2017) (proper  
 3 vehicle is Rule 12(b)(6) which can be converted to Rule 56 summary judgment motion); *Guidotti*  
 4 *v. Legal Helpers Debt Resolution, L.L.C.*, 716 F.3d 764, 771 (3d Cir. 2013) (same).

5       The mechanism matters because a 12(b)(6) motion to dismiss requires the Court to make  
 6 all factual inferences in the nonmovant's favor. *Papasan v. Allain*, 478 U.S. 265, 286 (1986).  
 7 BNSF argues POV misstates the legal standard governing the issues and that in deciding the  
 8 motion, the Court is limited to determining only "(1) whether a valid agreement to arbitrate  
 9 exists and, if it does, (2) whether the agreement encompasses the dispute at issue." (Dkt. No. 26  
 10 at 5) (citing *Chiron Corp. v. Ortho Diagnostic Sys., Inc.*, 207 F.3d 1126, 1130 (9th Cir. 2000)).  
 11 By focusing on the motion to dismiss standard, BNSF argues, POV attempts to end-run the  
 12 arbitration clause and force the Court to accept all its allegations as true. (*Id.*) While the central  
 13 question is certainly whether these claims are subject to arbitration, the Court agrees disputed  
 14 facts should be resolved in favor of the non-movant, POV.

15       The parties provide the court with different accounts of BNSF's compliance with the  
 16 award under the three disputed ongoing issues related to rates, access, and alien cars.

### 17           **1. Rates**

18       In the final award, the panel ruled "BNSF must promptly create a schedule of the various  
 19 applicable reasonable and customary switching rates to be charged. BNSF's rates should be  
 20 based on objective factors typically used to determine switch rates for access to the ports it  
 21 serves. This schedule is to be shared with POV and potential customers." (Dkt. No. 1 at 92.)  
 22 The panel explicitly avoided acting as a rate-setting board, but explained it intended to put

1 customers obtaining access to the port from BNSF and UP on equivalent footing. (*Id.* at 90.)

2 Specifically, the panel:

3 appreciates that certain shipments impose different costs from other shipments.  
 4 While these cost differences may not be precisely captured in switching rates, the  
 5 requirement that we impose on BNSF to provide its switching rates to the Port and  
 6 Rail Customers will allow comparison with switching rates at other ports on the  
 7 Pacific coast with which POV competes. The panel anticipates that over time  
 8 BNSF's rates at the Port will converge with the costs of providing these services  
 and be competitive with rates at other alternative ports. To facilitate this  
 convergence, the panel imposes, consistent with a plain reading of the [Agreement],  
 a requirement that BNSF offer to UP customers switching rates no greater than rates  
 BNSF offers to its own linehaul customers bringing comparable quantities and  
 characteristics of freight under similar conditions.

9 (*Id.*)

10 The Complaint alleges BNSF did not provide a rate schedule of reasonable and  
 11 customary rates, instead publishing rates for Terminal 4 and 5 ranging between \$460 to \$600 per  
 12 car, and rates for Terminals 2 and 3 of \$750 per car regardless of single car or unit, so long as the  
 13 traffic is not hazmat or oversize. (*Id.* at 9.) POV points out BNSF serves no traffic of its own at  
 14 Terminals 4 and 5, and argues BNSF has spiked its rate artificially for those terminals to still be  
 15 "equivalent" to UP and meet its obligation. (Dkt. No. 25 at 11–12.) By contrast, BNSF charges  
 16 switching fees of \$105 per car for unit trains and \$295 per car for single cars at competing ports  
 17 in Grandview, Hoquiam, Interbay, Seattle, Spokane, Sunnyside, and Tacoma in Washington, and  
 18 Portland, and Salem in Oregon. (Dkt. No. 1 at 9–10.) The two parties dispute whether this  
 19 course of action is consistent with the award.

20 **2. Access**

21 In the discussion regarding rates, the panel observed the Agreement, "read in its  
 22 entirety[,] appears to contemplate competitive access to the entire Port (with the exceptions noted  
 23 in Article III Section 3 A (iii)), especially as rail customers are likely to be those of either BNSF  
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1 or UP.” (Dkt. No. 1 at 88.) POV’s complaint alleges BNSF’s commercial access obligations  
2 apply to the entire port except to the extent UP had service to particular port locations under  
3 separate agreements between BNSF and UP. (*Id.* at 7.) BNSF argues the award does not require  
4 setting competitive rates for the entire port, but rather acknowledged “access to the entire port” is  
5 controlled by the definition of Rail Customers in the Agreement which is subject to the  
6 exceptions at Article III Section 3 A (iii). (Dkt. No. 21 at 19.) One of those exceptions excludes  
7 from “Rail Customers” customers who are not addressed in the rate schedule Exhibit F attached  
8 to the Agreement. (*Id.* at 19 n.5.) The rates in Exhibit F only apply to Terminals 4 and 5, and  
9 therefore, BNSF argues it is not required to provide rates beyond those two terminals. (*Id.* at  
10 19.)

11       POV cites numerous statements within the award indicating the panel’s alleged intent to  
12 require BNSF to establish rates for all port facilities. (Dkt. No. 25 at 7–8.) If the commercial  
13 access were limited to Terminals 4 and 5, POV argues, the panel would have said so rather than  
14 stating access extends “to the entire Port” subject to the exclusions. (*Id.* at 8.) POV also points  
15 out BNSF’s interpretation of the Exhibit F exclusion renders the other two exclusions  
16 superfluous. (*Id.* at 8–9.) The three exclusions address: (1) locations and customers covered by  
17 other agreements existing as of the effective date; (2) certain types of commodities/equipment  
18 “already excluded, with no rates established, or not addressed” in Exhibit F; and (3) intermodal  
19 (trailer/container rail/truck) traffic. POV points out Exhibit F does not establish or address any  
20 rates for intermodal freight, so under BNSF’s interpretation, the non-inclusion of intermodal  
21 freight in Exhibit F means such traffic is excluded from UP commercial access not just at  
22 Terminals 4 and 5, but throughout the Port as a whole. (*Id.*)

### 3. Alien cars

The panel observed “it does not follow that BNSF’s ERO status allows it to use POV property for purposes un-related to the interests of POV and parking of rail cars not destined to pick up freight from, or deliver it to, the Port or its tenants serves no purpose of POV.” (Dkt. No. 1 at 94.) The panel indicated in “switching rail cars on POV trackage[,] some rail cars not destined for POV tenants may from time to time be included in switching cars. But BNSF’s use of POV trackage appears far more extensive, including rail cars of essentially every description and for other than limited or short periods.” (*Id.*) Thus, the panel awarded POV charges for storage of the alien cars. (*Id.* at 95.) POV’s complaint brings a trespass claim based on the BNSF’s improper storage of alien cars. (*Id.* at 11.) BNSF argues the storage of alien cars was not categorically banned by the award and interprets the panel’s comments to mean the presence of some alien cars is permissible. (Dkt. No. 21 at 22.) In any event, BNSF argues, a trespass claim is an entirely new issue not addressed in the award, therefore subjecting it to arbitration under the Agreement. (*Id.* at 20.)

POV submits the trespass claim arises outside the enforcement of the award because the panel found storing alien cars does not fall within the scope of BNSF's privileges within the Agreement. (Dkt. No. 25 at 16.) According to POV, this language means alien cars are not covered or contemplated by the Agreement at all, and therefore the \$7 per car recovery did not sound in contract but rather in tort. (*Id.*) Accordingly, POV believes the trespass claim does not arise out of the Agreement and is therefore not subject to arbitration. (*Id.*)

\* \* \*

Under the 12(b)(6) standard, POV argues any material factual questions regarding what the award requires, whether BNSF has complied with the award, and what remedies are

1 appropriate should be left for further proceedings. (Dkt. No. 25 at 6.) It argues if the award can  
 2 reasonably be read as supporting POV's position, then BNSF's motion must be denied. (*Id.*)  
 3 Although for the purposes of a motion to dismiss the Court must take all the factual allegations  
 4 in the complaint as true, it is not bound to accept as true a legal conclusion couched as a factual  
 5 allegation. *Papasan v. Allain*, 478 U.S. at 286.

6 Most of the disagreements outlined in this matter do not appear to be factual. For  
 7 example, both parties agree BNSF has only provided rates for Terminals 4 and 5. The  
 8 disagreement arises in whether BNSF's provision of rates for only Terminals 4 and 5 complies  
 9 with the award. POV's assertion any "material factual questions" regarding whether BNSF is  
 10 complying with the award should be assumed in POV's favor confuses factual assumptions and  
 11 legal conclusions. Whether BNSF's conduct complies with the award is a legal conclusion and  
 12 cannot be taken as true for purposes of a motion to dismiss. To the extent there are factual  
 13 disputes, they are viewed in the light favorable to POV. For example, BNSF never actually  
 14 admits to leaving alien cars on POV property. (*See* Dkt. No. 21 at 20–22.) In this instance, the  
 15 Court assumes alien cars are being left on the property as asserted in POV's complaint. But  
 16 whether leaving the cars on the property amounts to a violation of the award is a legal conclusion  
 17 incapable of being construed in anyone's favor.

18 Assuming the well-pled facts in the complaint are true, the Court turns to whether the  
 19 claims should be dismissed subject to the arbitration provision.

20 **B. The arbitration award is ambiguous and judicial interpretation is therefore  
 21 inappropriate.**

22 At issue is what the Supreme Court has referred to as a "question of arbitrability," for its  
 23 answer will determine whether the underlying controversies will proceed to arbitration on the  
 24 merits. *Hosam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 83 (2002). "An order to arbitrate the

1 particular grievance should not be denied unless it may be said with positive assurance that the  
 2 arbitration clause is not susceptible of an interpretation that covers the asserted dispute. Doubts  
 3 should be resolved in favor of coverage.” *United Steelworkers of America v. Warrior & Gulf*  
 4 *Co.*, 363 U.S. 574, 582–583 (1960).

5 Neither party disputes the Federal Arbitration Act (FAA) governs the Agreement or that  
 6 disputes arising out of the Agreement as a general matter must be arbitrated. (See Dkt. No. 21 at  
 7 12; 25 at 4–6); *see also Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24  
 8 (1983) (finding federal law, in the FAA, governs the arbitrability of a dispute in either state or  
 9 federal court.) Rather, they disagree as to whether these claims arise out of the existing  
 10 arbitration award, warranting judicial enforcement of the previous judgment, or are novel claims  
 11 arising under the Agreement and therefore subject to the arbitration clause (with the exception of  
 12 the trespass claim, which POV argues arises out of tort law).

13 But even if the claims arise out of the award, the Court can only enforce the award if it  
 14 can be unambiguously interpreted. “The Court may not improperly substitute its interpretation  
 15 of the arbitration award for that of the arbitrator.” *Int'l Bhd. of Elec. Workers v. ADT, LLC*, No.  
 16 C18-0905-JCC, 2018 WL 6696694, at \*2 (W.D. Wash. Dec. 20, 2018); *see also Sunshine*  
 17 *Mining Co. v. United Steelworkers of Am., AFL-CIO*, 823 F.2d 1289, 1295 (9th Cir. 1987)  
 18 (finding district court erred in substituting its interpretation for arbitrator's); *Hanford Atomic*  
 19 *Metal Trades Council, AFL-CIO v. Gen. Elec. Co.*, 353 F.2d 302, 307–308 (9th Cir. 1965)  
 20 (remanding to a Board of Arbitration an opinion requiring clarification and interpretation—a  
 21 “task to be first performed by the arbitration committee and not the court[.]”). “Courts should  
 22 not interpret or enforce ambiguous awards, unless the ambiguity can be resolved from the

1 record.” *Int'l Bhd. of Elec. Workers* 2018 WL 6696694, at \*3 (finding arbitrator’s use of the  
2 phrase “as soon as is practicable” too ambiguous for judicial enforcement).

3 Against this backdrop, and upon review of the award and the parties’ arguments, the  
4 Court finds the award is too ambiguous regarding the parties’ disagreements for this Court to  
5 interpret or enforce it against BNSF. The award is unclear in many respects relevant to this  
6 dispute.

7 First, the panel was “not prepared to act as a rate-setting board” and imposed only a  
8 “requirement that BNSF offer to UP customers switching rates no greater than rates BNSF offers  
9 to its own linehaul customers bringing comparable quantities and characteristics of freight under  
10 similar conditions.” (Dkt. No. 1 at 90.) In the same breath, the panel noted it “expected the Port  
11 and BNSF to develop a mutually satisfactory schedule of rates[,]” which the parties did not do,  
12 and only re-emphasized it was not equipped to serve as a rate setting body. (*Id.* at 91–92.) It  
13 therefore limited its ruling to a standard it believed consistent with the Agreement and the  
14 panel’s capabilities by imposing “a requirement that henceforth BNSF offer to UP and its  
15 customers that access to the Port from UP linehaul traffic shall be at the same switching rates and  
16 terms as BNSF offers to its linehaul customers under the same or similar circumstances and  
17 freight.” (*Id.*) The panel acknowledged BNSF “could match switching rates offered to UP and  
18 adjust linehaul rates downward to its customers to account for any give-back on switching rates”  
19 but emphasized such behavior would be contrary to the covenant of good faith and fair dealing.  
20 (*Id.* at 92–93.) The panel’s comments of what it “expects” and what BNSF “could” do provide  
21 little to work with in terms of concrete instructions. While recognizing BNSF’s potential to  
22 misuse the standard, the panel did not set forth any remedy for that situation nor contemplate the  
23 situation POV alleges here. On the one hand, the only explicit requirement is the equivalency of  
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1 rates between BNSF and UP; on the other, the panel spends a good part of its analysis  
2 acknowledging BNSF works off technicalities to avoid effectuating POV’s intent to increase  
3 competition and attract new tenants to the port. (*Id.* at 92) (“What POV complains of here is the  
4 obvious fact that BNSF is not incented under the terms of the [Agreement], as BNSF has  
5 heretofore interpreted it, to drum up business for the Port.”).

6 BNSF’s proposed equivalent rate appears suspect compared to the “reasonable and  
7 customary” measure, but the panel failed to create any sort of concrete rate schedule or  
8 calculation with which to compare BNSF’s proposed rates. The panel noted it would be  
9 “difficult to imagine that POV would have agreed to allow BNSF as ERO to charge rates that  
10 would hobble POV from attracting business from UP customers or from competing with other  
11 ports.” (*Id.* at 88.) The panel also “anticipate[d] that over time BNSF’s rates at the Port will  
12 converge with the costs of providing these services and be competitive with rates at other  
13 alternative ports.” (*Id.* at 90.) This statement suggests, without defining when, the rate BNSF  
14 sets will eventually be competitive with other ports. Whether this is a requirement or merely  
15 something the panel “anticipates” will happen naturally is unknown. This commentary contains  
16 no standard or calculation capable of application with amount of certainty. What constitutes a  
17 “reasonable and customary” rate under the award is sufficiently ambiguous.

18 Second, the award is similarly unclear when it comes to whether BNSF is required to  
19 provide rates to the entire port. The panel notes BNSF “may not simply rely on Exhibit F rates,”  
20 and instead must “offer the same ‘reasonable and customary’ rates without regard to whether  
21 BNSF or UP provides linehaul service to access the Port.” (*Id.* at 92). But the panel noted the  
22 Agreement “read in its entirety appears to contemplate competitive access to the **entire** Port  
23 (**with the exceptions noted in Article III §3 A (iii)**).” (*Id.* at 88) (emphasis added). Access to  
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1 the “entire” port is explicitly subject to the exception BNSF hangs its hat on. The award does  
2 not address the question otherwise. It does not identify Terminals 4 and 5 separate from “access  
3 to the port,” nor does it interpret any of the exceptions at issue. It fails to define “access” in any  
4 measurable way. To determine what the panel meant by “access to the port” would resolve  
5 ambiguities by guesswork, requiring this Court to improperly substitute its interpretation of the  
6 award for that of the arbitrators.

7       Third, the panel’s award on the storage of alien cars does not provide clarity to resolve  
8 the ongoing alien car dispute. According to POV, the presence of the cars is not governed by the  
9 Agreement and therefore an action for trespass can be sustained outside the arbitration clause.  
10 (Dkt. No. 25 at 16.) But the panel interpreted the contract to foreclose BNSF from storing alien  
11 cars on POV property. To the extent the alien car issue was not originally covered by the  
12 Agreement, the Court finds the parties brought the issue within the purview of the arbitration by  
13 presenting their arguments on the matter and the panel reaching a conclusion, largely based on  
14 the interpretation of the Agreement. The panel found “at a fundamental level, BNSF’s use of  
15 Port property for non-Port purposes is inconsistent with access to the Port by two Class I  
16 railroads which plainly emerges as central to both parties’ intent and understanding in [forming  
17 the contract].” (Dkt. No. 1 at 93.) The panel found (1) BNSF’s status as ERO does not allow it  
18 to use POV property for purposes unrelated to the interests of POV; (2) parking of rail cars not  
19 destined to pick up freight from or deliver it to the port or its tenants serves no purpose of POV;  
20 (3) BNSF’s proposed \$7 rate for past storage of alien cars was justifiable and (4) BNSF was  
21 ordered to pay the rate retroactively. (*Id.* at 93–95.) But the panel did not say whether the rate  
22 applied prospectively. The panel also did not say whether the presence of *any* alien car violates  
23 the agreement, commenting some cars not destined for POV tenants may “from time to time”  
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1 exist on the property, making no determination as to whether such behavior violated the  
 2 Agreement, noting only “BNSF’s use of POV trackage appears far more extensive.” (*Id.* at 94.)  
 3 The award leaves open how many alien cars BNSF is permitted to keep on the property, whether  
 4 it incurs storage rates for those cars, and whether the rate is \$7 in the future. This Court cannot  
 5 answer these questions without additional clarity of the award, which cannot be obtained through  
 6 further development of the record.

7       This Court cannot say “with positive assurance that the arbitration clause is not  
 8 susceptible of an interpretation that covers the asserted dispute.” *United Steelworkers*, 363 U.S.  
 9 at 582–583. Any doubt about the Agreement’s arbitration clause covering POV’s claims should  
 10 be resolved in favor of coverage. But the coverage issue need not even be determined because  
 11 arbitration is appropriate in either event. If the award’s ambiguity is a sign the award does not  
 12 cover the issues here, the claims are then novel, but arise under the Agreement, subjecting them  
 13 to arbitration. If the claims are indeed covered by the award (which the Court suspects they are—  
 14 including the trespass claim), given the award’s ambiguity, those claims must be resolved by the  
 15 arbitrators. All three matters were addressed in some way by the panel but were not resolved  
 16 conclusively. The Court is without the authority to interpret or enforce the panel’s ambiguous  
 17 award unless the ambiguity can be resolved from the record. *Int’l Bhd. of Elec. Workers* 2018  
 18 WL 6696694, at \*2. Further discovery and fact development cannot resolve whether BNSF is  
 19 complying with the panel’s award. Therefore, dismissal and resolution by arbitration are  
 20 appropriate.

#### 21                          IV. CONCLUSION

22       Accordingly, and having considered BNSF’s motion, the briefing of the parties, and the  
 23 remainder of the record, the Court finds and ORDERS the Motion to Dismiss and Compel  
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1 Arbitration (Dkt. No. 21) is **GRANTED**. BNSF's pending Motion to Stay Discovery (Dkt. No.  
2 30) is stricken as moot, and the case is dismissed.

3 Dated this 15th day of January 2024.

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David G. Estudillo  
United States District Judge